In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-741

MY STORE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On May 25, 1964, the Board issued a decision in which it found that petitioner had engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, that the ensuing strike was attributable to these unfair labor practices, and that petitioner had further violated the Act by rejecting the union's unconditional request of July 11, 1963, that the strikers be reinstated. The Board ordered petitioner, *inter alia,* to offer those strikers who had made unconditional requests for reinstatement full and immediate reinstatement to their

former or substantially equivalent positions, and to make them and other employees who were discriminated against whole for any loss of pay suffered as a result of the unfair labor practices. 147 NLRB 145. The court of appeals enforced this order in full on April 7, 1965 (345 F. 2d 494), and this Court denied certiorari on November 22, 1965 (382 U.S. 927).

Thereafter, pursuant to the Board's petition, the court of appeals held petitioner and its president in civil contempt for failing to make valid offers of reinstatement to the strikers (Pet. App. A1–A9).[1] The court rejected petitioner's contention that the staggered offers it had made to the strikers during the strike were valid, finding that such offers were motivated by animosity toward the union and were made "wilfully and contumaciously with knowledge that they were not in compliance with the Board's order of May 25, 1964, enforced by the Decree of this court entered July 6, 1965" (Pet. App. A7–A8). The court ordered petitioner's president, under pain of arrest, to comply with the Board's order within 10 days by making valid offers of reinstatement to the strikers (Pet. App. A8). No petition for a writ of certiorari was filed to review the contempt adjudication.

2. On June 14, 1968, the court of appeals, finding that the terms of purgation contained in its earlier order were satisfied, ordered that the case be remanded to the Board to determine the specific amounts of backpay due the strikers, the Board's out of pocket

[1] The court's order was issued on February 23, 1968, and modified on April 22, 1968.

expenses, and the content of the notices to be posted by petitioner (Pet. App. A10–A11). On February 27, 1970, the Board, after a further hearing, issued a Supplemental Decision and Order awarding backpay to the strikers of approximately $97,000, plus interest at 6 percent (Pet. App. A12–A17). The court of appeals enforced the Board's supplemental order, with one minor modification relating to the award of interest (Pet. App. A18–A28).

3. Petitioner's primary contention in the court of appeals was that the Board's supplemental decision in this case was inconsistent with other Board decisions holding that staggered offers of reinstatement, *made in good faith,* toll backpay as to those strikers who, preferring to return as a group, refused the offers. See *Southwestern Pipe, Inc.,* 179 NLRB 364; *O'Daniel Oldsmobile, Inc.,* 179 NLRB 398. No substantial legal issue is raised by the court's acceptance of the Board's holding that those cases were distinguishable on the basis of "the company's bad faith in making the staggered offers which required a response within one day, and at most three days, after the offers were mailed" (Pet. App. A25).[2] Moreover, the Board and the court were correct in holding that petitioner's bad faith in making the September–October 1963 reinstatement

[2] Exhibit D appended to the petition (Pet. App. A12–A17), setting forth the Board's Supplemental Decision and Order on the backpay issue, omits part of the final paragraph of point 1 in the Board's opinion (bottom of Pet. App. A15). For the information of the Court, we reproduce that portion of the opinion (point 1) in its entirety in the Appendix to this Memorandum.

offers was not open to redetermination in the backpay proceedings. The bad faith question was resolved against petitioner in the contempt proceedings, and that determination became final when petitioner did not seek timely review of the contempt adjudication by this Court (Pet. App. A7).[3]

4. Petitioner argues that the Board and the court erred in stating that the September–October 1963 reinstatement offers were in violation of the Board's May 1964 order and the court's July 1965 decision enforcing that order, since the original offers preceded these determinations. The offers, although made in bad faith, obviously could not be held to have been made in contempt of subsequently issued decrees; and we do not believe that the court, although its language was imprecise, intended to assert such a proposition. Rather, in finding that the reinstatement offers were in willful violation of the decree (Pet. App. A8), the court of appeals merely meant that petitioner had wrongfully continued to rest on the original, unlawful offers instead of making new, valid offers of reinstatement, as the Board order and the enforcement decree required. The reason liability for backpay was not tolled by the offers of reinstatement in the instant case, as it had been in *Southwestern Pipe* and *O'Daniel Oldsmobile,* was that the offers had been

[3] The fact that the court of appeals may have directed immediate compliance with its contempt judgment (Pet. 10) did not excuse petitioner's failure to seek timely review of that judgment. The making of new offers of reinstatement under the compulsion of the court's order did not moot the legal issue whether the original offers were valid.

found not to have been made in good faith, but to have been motivated by anti-union animus.[4] The fact of petitioner's subsequent contempt, however viewed, had no effect on the outcome of the backpay determination.

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

DECEMBER 1972.

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[4] As the Board stated in its Supplemental Decision and Order (App., *infra*, p. 7):

> Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. * * *

APPENDIX

Excerpt From the Supplemental Decision and Order of the National Labor Relations Board (181 NLRB 321–322)

* * * *

1. We agree with the Trial Examiner that the question of the validity of Respondent's offers of reinstatement is *res judicata*. Despite the Board's court-approved order that Respondent reinstate those unfair labor practice strikers who had made unconditional offers to return to work on July 11, 1963, discharging replacements, if necessary, Respondent made offers to the approximately 20 strikers on a staggered basis, to no more than three employees at a time, while retaining eight replacement employees, during the September–October 1963 period. Thereafter, the Board petitioned the Court for adjudication of Respondent in civil contempt, maintaining that the offers to all strikers were invalid. The Court, as noted above, specifically found that the offers were invalid and made "willfully and contumaciously with knowledge that they were not in compliance" with the Board's order.

Respondent was only required to make new, valid offers of reinstatement to 12 strikers, which it did in purgation of the civil contempt adjudication, since the Board had informed the Court that it wished to consider herein the status of the remaining discriminatees in light of the holding in *N.L.R.B.* v. *Rice Lake Creamery Co.*, 365 F. 2d 888 (C.A.D.C.). While the question of the validity of Respondent's offers of reinstatement is *res judicata*, in any event, we agree with the Trial Examiner that the offers were invalid

as not giving the discriminatees adequate time within which to respond. See, e.g., *Betts Baking Company*, 173 NLRB No. 157; *Harrah's Club*, 158 NLRB 758; *Thermoid Company*, 90 NLRB 614. Therefore, since it is apparent that Respondent was not mislead by the strikers' responses to the offers, we adopt the Trial Examiner's treatment of the reinstatement and backpay rights of the eight employees whose status he determined in light of the holding in *Rice Lake*.

Subsequent to the Trial Examiner's Supplemental Decision herein, the Board, in *Southwestern Pipe, Inc.*, 179 NLRB No. 52, reversed prior law and held, in the language of a companion case, *O'Daniel Oldsmobile, Inc.*, 179 NLRB No. 55, that "where striking employees make an unconditional offer to return to work and the employer *without a discriminatory motive*, offers reinstatement to them as less than a group, backpay is tolled as to those strikers who receive offers of reinstatement but refuse then to return to work." [Emphasis supplied.] In light of those decisions, we granted Respondent's motion for permission to file a supplemental brief herein, since several of the strikers had refused Respondent's piecemeal offers of reinstatement, asserting their desire to return as a group. For the following reasons, we do not agree with Respondent's contention that backpay liability must be tolled as of the date each refused its seriatim offers of reinstatement in September–October 1963.

Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. Not only does the rule set forth

in *Southwestern Pipe* and *O'Daniel Oldsmobile* require the absence of a discriminatory motive, but it is clearly inapplicable to a situation where, as here, a Court has found that Respondent made such staggered offers of reinstatement "willfully and contumaciously with knowledge that they were not in compliance" with the Board's court-approved order. Finally, while the Board, in *Southwestern Pipe,* specifically noted that its new position in this area is consonant with that taken by the present court in *N.L.R.B.* v. *Robert S. Abbott Publishing Co.,* 331 F. 2d 209 (C.A. 7), where it disagreed with the Board's now-reversed rule, the same Court, in the civil contempt proceeding herein, distinguished *Abbott* in much the same manner as *O'Daniel Oldsmobile* describes the holding of *Southwestern Pipe,* by saying that *Abbott* involved an employer who had exhibited no antiunion animus.

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